APPENDIX A

28 U.S.C. § 1291 and Federal Rules of Civil Procedure

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Rule 15—Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action

will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States of any agency or officer thereof to be brought into the action as a defendant.

As amended Feb. 28, 1966, eff. July 1, 1966.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or

events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

As amended Jan. 21, 1963, eff. July 1, 1963.

Rule 17—Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought in the name of the United States. No action vides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As amended Feb. 28, 1966, eff. July 1, 1966.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative ca-

pacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or aginst it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 23—Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numer-

ous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest

of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class,

shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B

Opinion of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STATE OF NEW JERSEY, on behalf of itself and all political subdivisions and public agencies within the State,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Defendants.

M.D.L. No. 65

MEMORANDUM OPINION AND ORDER

The State of New Jersey has moved this Court for leave to file an amended complaint pursuant to Rule 15(a), Federal Rules of Civil Procedure. The gist of the amendment sought to be incorporated into the pleadings by the plaintiff State of New Jersey, is found in the insertion therein of the phrase, ". . . pursuant to the provisions of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b), on behalf of itself and all political subdivisions and public agen-

cies within the State." In explanation of this and other sections of the complaint sought to be amended, the Attorney General of the State of New Jersey says that he is attempting to clarify to the Court and to all parties the representative position of the Attorney General in antitrust matters, in accordance with the powers granted to the Attorney General by the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b), and to accurately reflect the status of political subdivisions and public agencies within the State for the purposes of this action. Stated another way, the Attorney General for the State of New Jersey is seeking to function in this case as representative of a class comprised of all political subdivisions within the State.

The Attorney General bases his authority to so amend on the New Jersey Antitrust Act and particularly that part which reads as follows:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law." N.J.S.A. 56:9-12(b)

The plain intendment of the New Jersey statute quoted above is to empower the Attorney General of that State to represent the State or any of its public subdivisions or agencies in an action to recover damages under either State or Federal antitrust laws. It does not purport to be, nor could it be, a modification of or an encroachment upon Rule 23 of the Federal Rules of Civil Procedure.

This Court deems the import of this statute, and its effect upon this litigation, to be a declaration by the legis-

lature of the State of New Jersey that that State Attorney General may sue the defendants in this case in the Federal Court on behalf of the State of New Jersey, or any named political subdivision for whom the Attorney General may properly act under New Jersey law. This statute does not mean, however, that without further leave of this Court the Attorney General of the State of New Jersey may sue on behalf of a class of unnamed political subdivisions within the State.

No application on behalf of the Attorney General of the State of New Jersey has been made to proceed as representative of a class composed of all of the political subdivisions and governmental agencies within the State. Absent considerations not now before the Court, this Court would not be disposed to grant leave to so proceed in any event.

The Attorney General for the State of New Jersey may of course proceed in this Court on behalf of the State of New Jersey and on behalf of any other political subdivisions or agencies of the State which become named plaintiffs and authorized the State Attorney General to represent them.

For these reasons, the motion of the plaintiff State of New Jersey for leave to file an amended complaint converting the prior action on behalf of the State into a class action on behalf of all the unnamed politcial subdivisions of the State, is denied.

ENTER:

FRANK J. MCGARR
United States District Judge

Dated: March 7, 1974

APPENDIX C

Opinion and Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted July 19, 1974; July 22, 1974

Before
HON. LUTHER M. SWYGERT, Chief Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge

STATE OF NEW JERSEY, on behalf of itself and all political subdivisions and public agencies within the State,

Plaintiff-Appellant,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY and CHRYSLER CORPORATION,

Defendants-Appellees.

No. 74-1380

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Appendix C

No. 73 C 1296

FRANK J. MCGARR, Judge.

ORDER

The State of New Jersey has appealed from an order of the district court denying leave to amend its complaint. Simultaneously with the docketing of this appeal, defendants-appellees filed a motion to dismiss the appeal for reason that the order appealed from is interlocutory and nonappealable. By order of this court dated May 20, 1974, appellant was permitted to respond to the motion to dismiss in its main brief on appeal.

In the district court, the State of New Jersey sought to amend its complaint by inserting in the caption of the pleadings "pursuant to provisions of the New Jersey Antitrust Act N.J.S.A. 56:9-12(b)." According to the appellant, the amendment would have corrected an error in the form of the complaint so as to clarify the fact that the Attorney General of New Jersey on behalf of all its political subdivisions and public agencies—and not as representative of named political subdivisions and public agencies as a class under Rule 23, Federal Rules of Civil Procedure—was instituting the action in compliance with the state's Antitrust Act, *supra*.[1] The district court denied leave to amend the complaint after determining that

[1] Apparently, the difference between the original complaint and the proposed amended complaint is that in the latter, New Jersey sought to represent its political subdivisions without complying with the class action requirements of Rule 23, FRCP.

§ 12(b) of the Act[2] could not be construed to permit the Attorney General of New Jersey, without further leave of the district court, to sue on behalf of a class of unnamed political subdivisions within the state. The district court noted that "The Attorney General . . . may of course proceed in this court on behalf of the State of New Jersey and on behalf of any other political subdivisions or agencies of the State which become named plaintiffs and authorize the State Attorney General to represent them."

On appeal here, appellant argues that the order appealed from though facially interlocutory, is "final" and appealable under the doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949) and its progeny.[3] We disagree.

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[2] Section 12(b) of the New Jersey Antitrust Act reads in part as follows:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law."

[3] It is clear that if the order does not fall within *Cohen* doctrin, it is nonappealable. There is no specific statutory authorization for the instant appeal, nor has the order been certified as appealable by the district judge under 28 U.S.C. § 1292(b). An order denying a motion to amend a complaint, which leaves the original complaint unaffected and does not terminate the case or any part thereof is not a final appealable order under 28 U.S.C. § 1291. *Kulesza* v. *Blair*, 41 F.2d 439 (7th Cir. 1930); *DeNubilo* v. *United States*, 343 F.2d 455 (2d Cir. 1965); 9 *Moore's Federal Practice* (2d ed. 1973), ¶110.08[1], p. 115.

Appendix C

The *Cohen* rule requires three characteristics of an order before it can qualify as a "final decision": (1) the order must be a final determination of a claim of right "separable from, and collateral to" rights asserted in the action; (2) it must be "to important to be denied review," in the sense that it presents a serious and unsettled question;" and (3) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review the . . . order and rights conferred . . . will have been lost, probably irreparably." *Cohen, supra* at 546-47. While the order presently under review may qualify as having characteristic (1), it falls far short of qualifying as having characteristics (2) and (3). The appellant here merely contends that: "The order of the Court below has a pernicious effect on the State antitrust program. If the order stands and the State is forbidden from exercising its inherent and reserved powers to control its own State agencies, then harm to innovative measures for antitrust enforcement will be irremediable." In our opinion the order denying the motion to amend the complaint in the instant case does not present a serious and unsettled question the review of which cannot await final judgment. The district court's order has not extinguished any substantive rights of New Jersey or its political subdivisions to litigate the claimed violations of the antitrust laws, subject to the due process requirements of Rule 23, Federal Rules of Civil Procedure. See *King* v. *Kansas City Southern Industries Inc.*, 479 F. 2d 1259 (7th Cir. 1973); *Eisen* v. *Carlisle and Jacquelin*, 379 F. 2d 119 (2nd Cir. 1966), *cert. den.* 386 U. S. 1035 (1967); *Jumps* v. *Leverone*, 150 F. 2d 876, 877 (7th Cir. 1945).

Accordingly, the motion of the appellees to dismiss this appeal is GRANTED, and the Clerk of the Court is hereby directed to enter the order of dismissal forthwith.